UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman SHARYAR A. RAHEEM
United States Air Force

ACM 36447

10 August 2007

Sentence adjudged 3 June 2005 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: Barbara E. Shestko (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 4 years and 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Major Matthew S. Ward, Major Amy E. Hutchens, Captain Daniel Breen, Captain Jefferson E. McBride, and Captain Jamie L. Mendelson.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

PER CURIAM:

Contrary to his pleas, the appellant was convicted, by a military judge, of one specification of carnal knowledge, three specifications of indecent acts with a child, and one specification of wrongfully receiving and possessing child pornography, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. His approved sentence consists of a dishonorable discharge, confinement for 4 years and 6 months, and reduction to E-1.

The appellant asserts five issues on appeal: (1) the military judge erred by admitting Prosecution Exhibits 5-9, which were purportedly "chats" with other underage individuals during the charged timeframe; (2) the evidence was legally and factually insufficient to support his conviction for all charges and specifications; (3) the military judge erred when she admitted evidence in violation of Rule for Courts-Martial (R.C.M.)

1001, and evidence that was not relevant and was highly prejudicial; (4) the appellant's sentence that includes a dishonorable discharge and 4 years and 6 months of confinement is inappropriately severe; and, (5) the appellant received ineffective assistance of counsel.[1]

Background

Sometime in 2003, the appellant began downloading child pornography in the form of still photographs and video clips. He accessed the web browser "Kazaa" and had the files go to a separate file on his computer entitled "Kazai". Additionally, he had several of the files located in a folder on his desktop. The computer was seized, analyzed, and files from the computer were entered into evidence.

The appellant enjoyed chatting with young females through the Yahoo messenger service. A number of the females were under the age of 16. One such girl was EC. After chatting for awhile, the appellant convinced EC they should meet on 19 July 2003. In previous chats, EC had indicated she was 16 and one time, 45. Prior to 19 July 2003, on 15 July 2003, she told the appellant she was 15 and he acknowledged that he knew that.[2] He said he would drive the 90 miles to where EC lived. Her parents were going to be out of town. He arrived late that night. When appellant arrived at EC's house, CA, EC's 10 year old friend, was there. Although, the testimony from EC was less than perfect, it was quite clear that on 19 July 2003, the appellant engaged in sexual intercourse with EC. And one time during the evening, he placed an ice cube in her vagina. The appellant's own admissions, the "chat traffic" between EC and the appellant, and the testimony from CA corroborated EC's version of events on 19 July 2003.

On 30 July 2003, the appellant and EC spoke and arranged to meet because the appellant was leaving for Iraq. This time, EC took SW along to a hotel where they met up with the appellant. The appellant fondled EC but was not as successful as in the previous encounter, so he decided to engage with the less-than-willing friend, SW. After blocking the door, and pinning the girls against the wall, he inserted his fingers into SW's vagina, pushing her tampon up further inside her until it hurt.

The girls did not willingly bring the situation to light. EC's step-father found a used condom in the garbage and confronted EC. She said she was raped and the civilian authorities got involved on 2 August 2003. The appellant was placed in civilian pretrial confinement for 6 days. On 3 August 2003, the appellant consented to seizure and search of his personal computer. The case was turned over to the Air Force. It took 2 years to get to Court – some of the time was due to the computer analysis.[3]

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[1] Errors 2, 4, and 5 are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C. M. A. 1982).
[2] EC actually turned 15 a few days after the last encounter with the appellant.
[3] During this time, the appellant employed the services of his civilian defense counsel, who represented him from the beginning up until and throughout his court-martial.

At trial, the appellant pled not guilty to all charges and specifications. The government called a computer expert, a child exploitation expert, EC, CA, SW, and the detective who interviewed the appellant. When questioned by the detective, the appellant basically confessed to carnal knowledge and the ice cube incident. He didn't remember touching SW, but if he did he must have thought it was EC.

The defense theory at trial was that the government could not prove when or if the appellant ever viewed the child pornography. Although the timing was an issue, the appellant took steps to locate the child porn and place it into specifically created files/folders. As to the other charges, the defense was mistake of fact as to age, and because the girls consented, the acts, if they occurred, were not indecent. Also, just because the appellant said they had sex that didn't mean sexual intercourse. The defense had a stipulation of expected testimony from the detective who interviewed EC and SW. They also called KW, the older sister of SW, to say that EC did lie about her age and that she bragged about having sex with the appellant.

Discussion

The defense objected to the admission of Prosecution Exhibits 5-9, which were online "chats", seized from the appellant's computer, with individuals other than EC and SW. The government's theory for the admission was these "chats" occurred within the charged timeframe, involved other underage females, and were indicative of motive, intent and countered the mistake of fact defense as to the age of EC. The military judge admitted the evidence under R.C.M. 404(b)[4] and conducted the proper balancing test.

Additionally, the appellant avers the military judge erred when she admitted, over defense objection, evidence in violation of R.C.M. 1001, and evidence that was not relevant and was highly prejudicial. Once again, the military judge applied the proper standards, and contrary to the assertion in the appellant's brief, conducted the proper balancing test.

We review a military judge's decision to exclude evidence under an abuse of discretion standard. *United States v. Barnett,* 63 M.J. 388, 394 (C.A.A.F. 2006) (citing *United States v. McDonald,* 59 M.J. 426, 430 (C.A.A.F. 2004)). "[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." *Id.* at 394 (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). The military judge did not abuse her discretion in admitting the evidence in dispute.

We have carefully considered the appellant's assertion that the evidence is legally and factually insufficient to sustain his conviction for all the charges and specifications. *See generally United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United*

[4] *See also United States v. Reynolds,* 29 M.J. 105 (C.M.A. 1989).

States v. Sills, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Applying this guidance, we conclude the evidence is legally and factually sufficient. *See United States v. Traylor*, 40 M.J. 248, 249 (C.M.A. 1994).

We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v Snelling,* 14 M.J. 267, 268 (C.M.A. 1982). We conclude that appellant's sentence, including the dishonorable discharge and 4 years and 6 months confinement, is not inappropriately severe.

As to the final assignment of error, ineffective assistance of counsel, we have reviewed the record of trial, the assignment of error, the government's answer thereto, and the affidavits submitted by both parties. The appellant states that he believes his case was rushed through, his trial defense counsel did not adequately prepare his case, and that the trial defense counsel did not call some of the witnesses, who were interviewed, that he believes would have helped his case.

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis,* 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight,* 53 M.J. 340, 342 (C.A.A.F. 2000)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). Counsel are presumed to be competent. It is well established, the appellate court will not second guess the strategic or tactical decisions made at the time of trial by the defense counsel. *United States v. Morgan,* 37 M.J. 407, 410 (C.M.A. 1993) (citing *United States v. Rivas*, 3 M.J. 282, 289 (C.M.A. 1977)). Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland v. Washington*, 466 U.S. at 687. *See also United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia,* 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell,* 55 M.J. 479, 482 (C.A.A.F. 2001). Because the appellant raised these issues by submitting a post-trial affidavit, we will resolve the issues in accordance with the principles established in *United States v. Ginn*, 47 M.J. 236, 248 (C. A. A. F. 1997). The appellant has failed to carry his burden on this issue, and we find the claim to be without merit.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

Senior Judge FRANCIS did not participate.

OFFICIAL

MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator